# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1938

# No. 18

JAMES E. DAVIDSON, PETITIONER,

*vs.*

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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[fol. a] [Caption omitted]

[fol. 1] **BEFORE UNITED STATES BOARD OF TAX APPEALS**

Docket No. 72904

JAMES E. DAVIDSON, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DOCKET ENTRIES

Appearances:

For Taxpayer: Geo. Rogers, Esq., John E. Walker, Esq., E. J. Svoboda, Esq., J. A. C. Kennedy, Esq., Claude M. Houchins, Esq.

For Comm'r: E. C. Algire, Esq.

1933.

July 10. Petition received and filed. Taxpayer notified. (Fee paid.)

July 10. Copy of petition served on General Counsel.

Aug. 2. Answer filed by General Counsel.

Aug. 14. Copy of answer served on taxpayer.

Oct. 21. Motion to consol. with Docket 61741 and 72405 for Circuit hearing at Omaha filed by General Counsel. 10/25/33 Granted and consolidated.

1935

May 2. Hearings set at Omaha, Nebr. week of June 3, 1935.

June 11. Hearing had before Mr. C. P. Smith, Div. 5, Submitted on merits. Appearance of Mr. Svoboda filed. Briefs due, pet's 7/25/35, respondent's 8/9/35, pet's reply 8/24/35.

June 19. Stipulation of facts filed.

June 19. Stipulation re photostatic copies initialed E. J. S. and E. C. A." filed.

July 1. Transcript of hearing of June 11, 1935, filed.

July 24. Motion for extension to Aug. 5, 1935, to file brief filed by taxpayer. 7/24/35 granted. Pet's brief due Aug. 5, 1935. Respondent's brief due Aug. 20, 1935, Pet's reply brief Sept. 4, 1935.

[fol. 2]

July 26. Motion for leave to file amended answer, amended answer lodged, filed by General Counsel. 8/5/35, Granted.

Aug. 5. Memorandum brief filed by taxpayer. 8/5/35 copy served.

Aug. 20. Brief filed by General Counsel.

1936.

May 8. Findings of fact and opinion rendered, Mr. Smith, Div. 5. Judgment will be entered under Rule 50.

May 23. Motion to correct the findings of fact filed by General Counsel.

June 12. Notice of settlement filed by General Counsel.

June 15. Order that motion filed 5/23/36; and the findings of fact contained in the Board's report promulgated 5/8/36 be amended, entered.

June 16. Hearing set July 8, 1936 on settlement.

July 8. Hearing had before Mr. Turner on settlement. Not contested—Referred to Mr. Smith for decision.

July 10. Decision entered, Eugene Black, Div. 15.

Oct. 10. Notice of appearance of Claude M. Houchins as counsel, filed.

Oct. 10. Motion to vacate decision and for rehearing and reconsideration filed by taxpayer. 10/12/36 denied.

1937.

Jan. 12. Notice of appearance of George Rogers as counsel filed.

Jan. 12. Petition for review by United States Circuit Court of Appeals, Eighth Circuit, with assignments of error filed by taxpayer.

Jan. 12. Proof of service filed by taxpayer.

Mar. 5. Agreed præcipe filed—with proof of service thereon.

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[fol. 3] Before United States Board of Tax Appeals

[Title omitted]

Petition of James E. Davidson for Appeal—Filed July 10, 1933

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commis-

sioner of Internal Revenue in his notice of deficiency dated May 12, 1933 and as the basis of his appeal sets forth the following:

1. The petitioner is an individual whose address is 5209 Burt Street, Omaha, Nebraska.

2. The notice of deficiency (a copy of which is attached hereto, made a part hereof and marked "Exhibit A") was mailed to the petitioner May 12, 1933.

3. The tax in controversy is income tax for the calendar year 1929 in the amount of $9,352.50 asserted against the petitioner.

4. The determination of tax set forth in said notice of deficiency is based upon the following error:

(a) The action of the Commissioner in improperly computing profit upon the sale of:

1. 3200 shares National Power & Light Company Common Stock.

2. 100 shares General Electric Company Common Stock.

The above securities were sold by the petitioner during 1929 and the Commissioner erred in applying to the proceeds of said sales the cost of certain blocks of the same class of securities which, in fact, the petitioner did not sell and the Commissioner failed to consider as the cost of the securities sold the cost of the blocks thereof which, in fact, were sold.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) 1. Prior to the year 1929, the petitioner had purchased certain shares of common stock of National Power & [fol. 4] Light Company which the petitioner, from the time of the original acquisition of such shares, considered as part of his permanent investments or "estate". Prior to January 1, 1929, the petitioner had placed with his broker 900 shares of said common stock of National Power & Light Company, with the specific understanding between the petitioner and his broker that such stock was to be considered at all times as "collateral stock", not to be sold unless specifically instructed by the petitioner or as might be necessary to protect the broker.

During the taxable year involved the petitioner purchased and sold, through his broker, certain blocks of National Power & Light Company common stock. In his tax return, the petitioner computed the profit incident to such sales by applying against the sales price the cost of various blocks of the same securities previously purchased specifically for trading purposes. The Commissioner has ignored the petitioner's allocation of securities sold to the blocks of securities specifically purchased by the petitioner for resale and has substituted therefor an arbitrary allocation of the securities erroneously assuming the sale of the petitioner's collateral stock.

2. On February 19, 1929, the petitioner purchased at a cost of $22,705.00 100 shares of General Electric Company common stock along with several other security purchases at the same time and made payment to the broker for said purchase on February 20, 1929 from the proceeds of a loan made specifically for said purchase from The Omaha National Bank. At the time payment was made for the securities instructions were given to the broker that they be delivered to the bank from which the loan was secured, to be held by the bank as collateral for the loan. The bank received said securities on March 4, 1929, among which was included certificate No. N. Y. C. 86242, dated February 26, 1929, in the name of James E. Davidson, for 100 shares of General Electric Company common stock. On March 26, 1929, said 100 shares of stock were sold by the broker for $22,791.00 to cover which there was delivered to the broker by the bank certificate No. N. Y. C. 86242 which had been received by the bank on February 26, 1929, the proceeds of said sale being delivered direct to the broker from the bank to apply on the loan previously negotiated for the purchase thereof.

The Commissioner has ignored the foregoing facts and has erroneously considered as the cost of the shares sold certain other General Electric Company common stock [fol. 5] owned by the petitioner and purchased a number of years prior to the taxable year involved herein.

6. The petitioner prays for relief from the deficiency asserted by the respondent in the following particulars:

(a) 1. The petitioner claims that the computation of profit realized upon the sale of the common stock of National

Power & Light Company is correct as reported in his tax return as filed and that the Commissioner should recognize, in his identification of the lots of securities purchased, in determining the cost of the securities sold, the petitioner's clear distinction as shown by his records between the securities purchased and held by the petitioner's broker for the petitioner as collateral and other securities of the same class purchased by the petitioner for trading purposes and, as such, sold by him.

2. The petitioner claims that the computation of the profit realized upon the sale of the common stock of General Electric Company is correct as reported in his return as filed and that the Commissioner should give proper consideration to the actual facts of the transaction. These facts clearly show the cost of the specific lot of the securities purchased which is applicable to the subsequent sale thereof made within the same taxable year.

Wherefore, the petitioner prays that this Board may hear and redetermine the deficiency herein alleged.

John E. Walker, Counsel for Petitioner, 1001 15th Street, N. W., Washington, D. C.

*Duly sworn to by James E. Davidson. Jurat omitted in printing.*

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[fol. 6] EXHIBIT "A" TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

May 12, 1933.

Mr. James E. Davidson, 5209 Burt Street, Omaha, Nebraska.

SIR:

You are advised that the determination of your tax liability for the year(s) 1929 discloses a deficiency of $9,352.50, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition

the United States Board of Tax Appeals for a redetermination of your tax liability.

However, If You Do Not Desire To Petition, you are requested to execute the inclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this form will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the inclosed form, or on the date assessment is made, whichever is earlier; Whereas If This Form Is Not Filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully, David Burnet, Commissioner, by W. T. Sherwood, Acting Deputy Commissioner.

Inclosures: Statement. Form 870.
Copy. 6-29-33. SAE.

[fol. 7] Statement

IT:AR:D-1. LD-60D.

In re Mr. James E. Davidson, 5209 Burt Street, Omaha, Nebraska

Income Tax Liability

| Year | Income tax liability | Income tax assessed | Deficiency |
|---|---|---|---|
| 1929 | $9,352.50 | None | $9,352.50 |

The deficiency shown herein is based upon the report dated November 11, 1931, prepared by Revenue Agent A. D. Berliner, and transmitted to you under date of November 21, 1931, which report is made a part of this letter.

Careful consideration has been accorded your protest dated December 1, 1931, in connection with the findings of the examining officer, and the information submitted at a conference held in the office of the internal revenue agent in charge.

Inasmuch as the year 1928 is before the United States Board of Tax Appeals for the same issue, this formal notice of deficiency is being mailed.

A consen' which will expire June 30, 1934, except as extended by the provisions of Section 277 of the Revenue Act of 1928 is on file for the year 1929.

Copy. 6-29-33. SAE.

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BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER OF COMMISSIONER OF INTERNAL REVENUE—Filed August 2, 1933

Comes now the Commissioner of Internal Revenue by his attorney E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled proceeding admits and denies as follows:

1, 2, and 3. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

[fol. 8] 4. Denies that the Commissioner of Internal Revenue erred in manner and form as alleged in paragraph 4 of the petition, sub-paragraph (a).

5. Denies all of the allegations of fact contained in paragraph 5, subparagraphs (a) 1 and 2 of the petition.

Denies generally and specifically each and every allegation contained in the petition of the above-named taxpayer not hereinbefore expressly admitted, qualified, or denied.

Wherefore, it is prayed that this appeal be denied.

E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

Of Counsel: E. L. Corbin, Special Attorney, Bureau of Internal Revenue.

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BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

MOTION FOR LEAVE TO FILE AMENDMENT TO ANSWER—Filed July 26, 1935

Comes now the respondent, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of In-